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July 13, 1995

Via Telecopy

Peter Raack, Esq.
Assistant Regional Counsel
United States Environmental Protection Agency
Region IV
345 Courtland Street, N.E.
Atlanta, Georgia 30365

Re: **Carrier Air Conditioning Site, Collierville, TN**

Dear Mr. Raack:

This responds to the July 11 letter addressed to you by Ralph Gibson, Esquire, counsel for Norfolk Southern Corporation. Mr. Gibson's letter expressed concerns about my letter to you of July 6, in which I noted the substance of Carrier's concerns as discussed during our telephone conference call earlier that day, in which Mr. Gibson participated, regarding Norfolk Southern's and Hill Brothers Construction Company's proposed use of Carrier's property. Please make this letter a part of the administrative record about this case.

This week Norfolk Southern filed an amended complaint in a local court in seeking a temporary restraining order intended to force access to Carrier's property so that Norfolk Southern and Hill Brothers may begin the transshipment of up to 300,000 tons of crushed limestone over the Superfund site. Norfolk Southern continues to present changing descriptions of its planned activities on the Carrier site, making it impossible to predict the final details of its plan for deploying trucks and other heavy machinery on the property in close proximity to ground water monitoring wells and other remediation equipment.

In these circumstances, I would suggest that Mr. Gibson's accusation that we have "misstated the facts" is off-target; the railroad's announced plan keeps changing, and these changes as well as the substance of what has been proposed make Carrier extremely apprehensive about its ability to continue the remediation work underway at the Collierville site, which has so far been very smooth, without interruption or interference. We hope to meet with

the Remedial Project Manager at the site tomorrow, together with Mr. Gibson, and En-Safe (our remedial contractor) in an effort to clear up and we hope resolve some of these issues. Had the railroad requested this effort first, instead of filing a lawsuit, these issues might already be resolved and appropriate steps taken to satisfy all parties' concerns, or at least to allow an orderly resolution of title disputes without threatening the ongoing remediation.

Although Mr. Gibson's letter neglected to mention it, we are informed that in April of this year, Hill Brothers brought bulldozers on Carrier's property south of the air conditioner manufacturing plant without Carrier's permission. Apparently Hill Brothers was under the mistaken impression that the property belonged to another landowner. Hill Brothers then reportedly cleared two acres of Carrier property, using heavy equipment. We are informed that Hill Brothers has acknowledged its mistake, and has reseeded the property, but obviously if trees were cut down that restoration will not be fully effective for some years.

In light of these reported mistakes by Hill Brothers, we believe that Carrier is entirely justified in the concerns expressed in my July 6 letter. EPA should not permit Hill Brothers or anyone else for this unloading work to come onto the property without proper, legally binding safeguards in place. If a company can mistakenly clear two acres of Carrier property believing it to be a different tract of land, we have no confidence that the same company will exercise due care with regard to costly monitoring wells that have been precisely located on the site.

We are informed that there is a monitoring well, number MW47A, located about 50 feet from the spur, and south of the access road. Another well, MW43, is north of the access road, and south of the spur. These are apparently stainless steel wells, installed at great cost to Carrier. The constant use of heavy equipment and the unloading of hundreds of thousands of tons of stone nearby these monitoring wells, which had to be precisely located and calibrated under EPA's direction, makes Carrier very anxious about the continued integrity of these wells. Unless EPA is prepared to state in writing that Carrier can now remove the wells, Carrier believes it must take steps to protect them lest Carrier be found in violation of the UAO, or lest Carrier be required to restore the wells, possibly repeatedly and at considerable expense.

Mr. Gibson's letter states that "Hill Bros.' use of the right of way should be of no concern to the EPA, especially since the intended use does not present a potential environmental hazard at the site." As Mr. Gibson indicated in the conference call that his client had not carefully examined the administrative order or the work under it as late as last week, we think his client's assurances on this score are entitled to little weight. We would respectfully suggest that it is EPA's decision, not the railroad's, as to whether the railroad's proposed activities will indeed pose environmental concerns.

Indeed, we established in our conference call that Norfolk Southern's and Hill Brothers' proposed activities on Carrier property were of potential concern to EPA. Any activity by parties other than EPA or Carrier occurring on the Superfund site not conducted pursuant to the Unilateral Administrative Order (UAO) is of potential concern. In this case, given Hill Brothers' recent record for the mistaken and destructive use of heavy equipment on Carrier's property, binding assurances are needed for the protection of the monitoring and remediation systems.

As we discussed during the conference call, Carrier's overriding interest in this matter is to protect the ongoing remediation pursuant to the UAO, and to defend against any interference caused on-site by the activities of Norfolk Southern, Hill Brothers, or their contractors. Carrier objects to Norfolk Southern's continued effort to argue its right to unrestrained access to the Superfund site on the basis of local property law, under which Carrier believes that the railroad has no such right. Moreover, state or local law does not entitle Norfolk Southern to interfere with an ongoing remedial project conducted under the authority of federal law, in this case, sections 104 and 106 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

While we acknowledged in the conference call that Norfolk Southern has no intention of deliberately interfering with the remediation or causing further contamination at the site, we also agreed that Norfolk Southern, Hill Brothers or their contractors deploying trucks and other heavy equipment to transport up to 300,000 tons of crushed limestone, might inadvertently damage on-site monitoring apparatus or interfere with cleanup work, such as monitoring wells MW47A and MW43, said to be near the siding. They are obviously at risk.

If Norfolk Southern is completely confident that it will not undertake any activity on Carrier's property that may jeopardize the remediation pursuant to the UAO, Norfolk Southern and Hill Brothers should agree to be added to the existing UAO, with terms that prohibit either of them or their contractors, agents, servants, employees or those in privity with them, from interfering with the performance of the remedy or from damaging monitoring wells or remediation systems. Such an addendum should affirm that Norfolk Southern will be financially responsible to EPA and to Carrier for any action by Norfolk Southern, Hill Brothers, or by contractors of either company at the site that might interfere with or add to the costs of implementation of the UAO.

If Norfolk Southern is unwilling to execute an addendum to the UAO and insists on its proposed multi-year operation involving the property without taking steps to protect the interests of EPA and Carrier, and more importantly the interests of the 12,000 people who drink the water protected by the treatment system on the City wells, Carrier hereby respectfully requests that

Region IV issue an order requiring Norfolk Southern to comply with all relevant terms of the UAO, including, but not limited to:

(1) the requirement that EPA and its contractors be assured unrestricted access to the property, UAO § XVIII, including monitoring wells MW47A and MW43 and the ground water remediation and treatment system on the City wells. Although Norfolk Southern states that the site access road will not be closed, Carrier has no way of ensuring that interference will not result from inconvenient or dangerous placement of trucks and other heavy equipment, or other materials which may be left on the site from time to time, such as discarded ballast and mounds of crushed limestone or excavated dirt. Such obstacles could seriously interfere with EPA's free movement on the property, particularly if EPA requires emergency access to the site during the work day or when visibility is poor The critical ground water treatment system on the City wells -- the linchpin of the remedial work -- is at the end of the access road, so this is an important concern;

(2) the requirement that Norfolk Southern and Hill Brothers preserve and ensure EPA's right to inspect all documents concerning activities engaged in by Norfolk Southern, Hill Brothers or their contractors that relate to the site. UAO §§ XX.A, XXI;

(3) the requirement that Norfolk Southern reimburse EPA and Carrier for increased costs resulting from Norfolk Southern and Hill Brothers' proposed activities on the site. Norfolk Southern has already asked EPA to attend a preliminary site inspection, which could begin to add to the costs of EPA oversight at the Superfund site. It is reasonable to expect that the proposed activities by Norfolk Southern and Hill Brothers would require further cost increases for soil sampling, monitoring, oversight, travel and legal time spent by EPA. It would certainly be inequitable to require Carrier, which would derive no financial benefit whatsoever from the limestone transshipment contract, to reimburse EPA for cost increases at the Superfund site caused by Norfolk Southern and Hill Brothers in pursuing their profit-making venture. The statement in Norfolk Southern's complaint, ¶ 10, that Carrier had demanded license fees to transit the property is untrue, and is offensive given the cooperation Carrier has extended first to the City, then to Hill Brothers, and then to the railroad in an effort to accommodate this project.

Moreover, Carrier's costs of remediation at the site may increase as a consequence of the proposed activities. Carrier's technical consultant, EnSafe, has raised concerns about the amount of airborne particulates resulting from the movement of trucks and crushed limestone across the property. Increased particulates may cause clogging of the intakes for the air stripping systems used in the treatment systems for the two City wells on the site. This potential problem may require installation of air filters, boosting of fan powers, and other measures, either requiring an upgraded system or jeopardizing the ongoing ground water treatment and the quality of water

supplied to 12,000 people. It would be inequitable to allow the railroad to impose such costs on Carrier because of Norfolk Southern's and Hill Brothers' failure to control dust emissions properly.

(4) The requirement that Norfolk Southern and Hill Brothers comply fully with stormwater discharge requirements under section 402(p) of the federal Clean Water Act, as implemented under Tennessee law. Carrier currently has a discharge permit which requires it to control the discharge of suspended solids from the plant yard. The increase in particulates likely to result from the crushed stone operation may well make compliance with that permit problematic for Carrier. Although the crushed stone operation is clearly the kind of industrial operation meant to be covered by section 402(p), there is no indication that Norfolk Southern or Hill Brothers has applied for, or obtained the necessary stormwater discharge permit for these activities. Usually, such permits require a detailed description of site activities, and as noted above, the descriptions provided Carrier have materially changed over time. Even if the railroad or Hill Brothers has such a permit, they have not shared that information with Carrier, or made an effort to coordinate the requirements of such overlapping permits;

(5) the requirement that Norfolk Southern, Hill Brothers and all entities that contract with Norfolk Southern concerning the transshipment of limestone over Carrier property satisfy the insurance and indemnity provisions of the UAO, § XXIII.B. Considering that millions of dollars have been invested at this site in state-of-the-art soil and ground water treatment and monitoring equipment, both Norfolk Southern and Hill Brothers should be required to carry liability and environmental impairment insurance and execute indemnity agreements to Carrier that account for the risks of potential disruptions at the site. We are informed that Hill Brothers is having difficulty obtaining such coverage, making Norfolk Southern's refusal so far to indemnify Carrier for Hill Brothers' actions a very serious concern.

Mr. Gibson's letter contends that it is "absurd" that Norfolk Southern may be a responsible party for the costs at this site, contending it is simply an easement holder. Yet in this case, the activities to be conducted here would make it an "operator" under section 107, particularly if Hill Brothers interferes with the remediation work. Unlike remediation contractors, who receive some protection from operator status under section 119 of CERCLA, Hill Brothers and those in privity with it enjoy no such protection here. As we discussed on the conference call, the railroad cannot hide behind Hill Brothers to avoid CERCLA liability. If it wishes to undertake these profit-making activities at the site, it will be responsible under CERCLA for the remedial cost increases it causes.

Carrier has been and will continue to be a good neighbor in the Collierville community. Carrier has not filed lawsuits against others in the community, and it continues to be Carrier's

desire to resolve this particular matter amicably. Given the constantly changing legal tactics employed by Norfolk Southern in its quest to gain unrestricted use of Carrier property, however, and the changing factual descriptions of the activities proposed for the site, Carrier has no way of predicting what will be the final details of Norfolk Southern's and Hill Brothers' course of conduct on Carrier's property. Therefore, Carrier must insist that adequate, legally binding safeguards be put in place to prevent interference with the remediation. In Carrier's view, an addendum to the Administrative Order or a Unilateral Administrative Order (UAO) would go far to providing such protection, and more important to EPA, assurance that the remedial work goes forward unimpeded by other site activities.

Carrier takes very seriously its obligations under the UAO and will take all reasonable steps to defend that UAO from potentially disruptive activities of other parties. If Norfolk Southern persists in conduct which threatens to undermine the cleanup at this site, Carrier may have no alternative but to defend the UAO through litigation. Given Norfolk Southern's use of the court system to attempt to force entry onto the Superfund site, Carrier may already have grounds to bring an action against Norfolk Southern in the United States District Court for the Western District of Tennessee, under section 310(a)(1) of CERCLA, 42 U.S.C. § 9659(a)(1) (1988) and EPA implementing regulations. 40 C.F.R. §§ 374.1-374.6 (1994). If forced to file such an action, Carrier will surely seek all appropriate relief for damages resulting from Norfolk Southern's interference with remediation at the plant, which may include mandatory and injunctive relief, declaratory relief, compensatory damages, response costs (including interest), all costs of litigation, including but not limited to attorney's fees and expert witness fees, and such other relief as the Court may award. Because Carrier still hopes that this matter can be resolved without resort to litigation, however, this letter should not be considered a formal notice of an intended citizen suit under CERCLA.

Thank you for your consideration in this matter.

Sincerely,

Russell V. Randle

Russell V. Randle
Counsel for Carrier Corporation

RVR:tcd

cc: Ms. Beth Brown
Remedial Project Manager, EPA Region IV

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